Supreme Court, U.S.
FILED
NOV 27 2006
OFFICE OF THE CLERK

No. 06-752

In The

Supreme Court of the United States

ESTATES IN EAGLE RIDGE, LLLP, A COLORADO LIMITED LIABILITY LIMITED PARTNERSHIP, TERRY D. HAMILTON, AND SHARON M. HAMILTON,

Petitioners,

vs.

VALLEY BANK AND TRUST, A COLORADO CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The Colorado Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

PAUL GRANT
6053 South Quebec Street, # 101
Centennial, Colorado 80111
(303) 771-1908

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

I. When a Colorado lender utilizes the state's public trustee and state court foreclosure proceedings to foreclose on a loan in default which is secured by real property, is due process satisfied where the lender provides its notice (through the court and public trustee) of default and of the foreclosure sale to the borrower and others obligated on the promissory note, only to the original addresses shown on the promissory note and deed of trust, even when the lender has information that the original addresses are obsolete at the time of foreclosure and even though the lender has actual knowledge of the then current addresses of the borrower and other obligors on the note?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, also named as a party in the trial court was Angela Dazlich, as the Public Trustee of Larimer County [Colorado]. The public trustee declined to participate in the proceedings below.

CORPORATE DISCLOSURE STATEMENT

Petitioner Estates in Eagle Ridge, LLLP, is a Colorado limited liability limited partnership which has no parent corporation and it has no publicly held company owning any interest at all in the limited partnership.

TABLE OF CONTENTS

Page

Question Presented i

Parties to the Proceeding ii

Corporate Disclosure Statement iii

Table of Authorities v

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory and Rule Provisions Involved 2

Statement of the Case 2

Reasons for Allowing the Writ 9

I. The Colorado court of appeals has in a published decision held that lenders can ignore their actual knowledge of a borrower's current address and send the borrower notice of default and foreclosure through the public trustee to the address provided by the borrower in the deed of trust, and foreclose on real property, even if the lender has actual knowledge that the address provided in the deed of trust is no longer valid, and even if the lender knows of the current address of the borrower, so long as the borrower has failed to provide the lender with formal written notice of a change of address. This decision informs all Colorado lenders that, in foreclosure proceedings, they can knowingly capitalize on a borrower's failure to send formal written notice of a change of address, knowing the address for notice provided in the deed of trust is obsolete, and take real property without ever making any effort to provide actual notice to the borrower of the default and foreclosure 9

Conclusion 11

TABLE OF AUTHORITIES

Page

CASES

American Land Co. v. Zeiss, 219 U.S. 47 (1911) 7

Jones v. Flowers, 126 S. Ct. 1708 (2006) 8, 9, 10

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 7, 9

Rael v. Taylor, 876 P.2d 1210 (Colo. 1994) 6

Robinson v. Hanrahan, 409 U.S. 38 (1972) 10

Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478 (1988) 11

CONSTITUTIONS, STATUTES AND RULES

United States Constitution, Amendment XIV 2

§ 38-37-102(1), Colorado Revised Statutes 2, 11

§ 38-37-102(2), Colorado Revised Statutes 11

§ 38-38-101, Colorado Revised Statutes 2, 11

§ 38-38-101(7)(a), Colorado Revised Statutes 11

§ 38-38-103, Colorado Revised Statutes 2, 11

§ 38-38-105, Colorado Revised Statutes 2, 11

§ 38-38-704, Colorado Revised Statutes 11

Rule 120, Colorado Rules of Civil Procedure 2, 11

OPINIONS BELOW

The Order granting Valley Bank and Trust's second motion for partial summary judgment is the judgment of the Larimer County District Court and was entered August 14, 2003, and a copy of the unpublished Order is attached at Appendix 16. The decision of the Colorado Court of Appeals affirming the district court judgment is now reported at 141 P.3d 838 and is attached at Appendix 1.

JURISDICTION

The trial court's summary judgment was entered on August 14, 2003, and final judgment entered on October 6, 2003. Petitioners' timely appeal was denied by the Colorado Court of Appeals in its order and opinion dated July 28, 2005. The petition for rehearing in that court was denied on September 22, 2005 and is attached at Appendix 18. Petitioners' timely petition for writ of certiorari in the Colorado Supreme Court was denied on August 28, 2006 and is attached at Appendix 19.

Jurisdiction of this court to review the final judgment of the Colorado supreme court is invoked pursuant to 28 U.S.C. § 1257(a).

This petition may call into question the constitutionality of state statutes or a state rule of procedure, thus 28 U.S.C. § 2403(b) may apply, and a copy of this petition will be filed upon the Colorado Attorney General.

CONSTITUTIONAL AND STATUTORY AND RULE PROVISIONS INVOLVED

U.S. Const., Amend. XIV provides, in pertinent part:

> .... nor shall any state deprive any person of life, liberty, or property without due process of law ...

Applicable Colorado state statutes:

> § 38-37-102, Colorado Revised Statutes
>
> § 38-38-101, Colorado Revised Statutes
>
> § 38-38-103, Colorado Revised Statutes
>
> § 38-38-105, Colorado Revised Statutes

Applicable Colorado rule of civil procedure

> Rule 120, Colorado Rules of Civil Procedure, Orders Authorizing Sales Under Powers

STATEMENT OF THE CASE

In September 2001, Respondent Valley Bank and Trust declared a default on a loan made to Petitioner Estates in Eagle Ridge, LLLP, and initiated foreclosure proceedings against petitioners, seeking a court order authorizing a foreclosure sale on a 164 acre parcel of land located in Larimer County, Colorado. Valley Bank filed its Rule 120 motion in Denver District Court, and obtained an order authorizing the public trustee of Larimer County, Colorado to sell the real property securing a loan made to Petitioner Estates in Eagle Ridge, LLLP. Co-petitioners Sharon Hamilton and Terry Hamilton had also signed the

promissory note and deed of trust, and were also entitled to notice under Colorado law.

Valley Bank provided to the Denver District Court and to the public trustee affidavits in which it swore that the last known address of Estates in Eagle Ridge and of the co-obligors, was 2629 Red Wing Road in Fort Collins, Colorado, the same address originally supplied by Estates in Eagle Ridge in the deed of trust. All notices of default and of the foreclosure sale were sent to that address alone, according to an affidavit filed by Valley Bank in support of their Second Motion for Partial Summary Judgment. Estates in Eagle Ridge had vacated the Red Wing Road address (a business office location) at least six months before the notices of default and foreclosure were sent in September 2001, and Valley Bank knew that in August 2001 because its own process server had provided a return of service affidavit in a related case stating that fact.

On March 14, 2001, six months before the foreclosure proceedings were commenced, *Estates in Eagle Ridge had communicated its new Fort Collins address (5401 Hood Lane) to Valley Bank in a letter to Bank loan officer Milt Wright*, discussing the property later foreclosed on and the status of the loan. V. 1 at 343-345.

Valley Bank also knew (at the time of initiating foreclosure) that it could serve Sharon Hamilton and Terry Hamilton and Estates in Eagle Ridge at an address it had for them in Modesto, California, where it had just served them in a related case. Terry Hamilton again communicated to the bank the new address of Estates in Eagle Ridge in Fort Collins – 5401 Hood Lane – in a September 14, 2001 letter (1 week before foreclosure proceedings were begun), discussing the same loan, addressed to Valley

Bank in care of *Joseph Bronesky*, its counsel, who was later involved in the foreclosure proceeding. V. 1 at 346; 347. Valley Bank did not provide the 5401 Hood Lane, Fort Collins, Colorado, address of Estates in Eagle Ridge, LLLP and Terry Hamilton either to the Denver District Court or to the public trustee of Larimer County when it commenced foreclosure on September 19 and 20, 2001. Exhibit C, V. 1 at 86 (list of addresses provided to the public trustee, showing Red Wing Road as the address of both Hamiltons and of Estates in Eagle Ridge). None of the petitioners ever received notice of the public trustee's sale or of their rights to redemption until after the property had been sold and the period of redemption had expired.

When Petitioners did belatedly learn of the sale, they filed suit in this action, asking that the sale be set aside. In its Answer, Valley Bank asserted, in part, that the sale was valid because it had provided proper notice of the proceedings to the Petitioners.

On February 19, 2003, the district court denied cross-motions for summary judgment on the claims in the complaint, finding that "The record demonstrates the existence of a disputed issue of material fact existed regarding Valley Bank's knowledge of the change of the physical addresses of the Plaintiffs." V. 1 at 191. Petitioners had presented affidavits in their opposition to summary judgment showing that Valley Bank had known the new addresses for Petitioners when initiating foreclosure and had failed to provide those addresses to the Denver District Court or to the public trustee conducting the foreclosure sale.

On August 14, 2003, the district court changed its mind and granted Valley Bank's Second Motion for Partial

Summary Judgment, finding that Valley Bank had provided sufficient notice of the foreclosure action to the plaintiffs, by sending notice to the address provided in the deed of trust, and also *holding that Colorado law allows notice to be provided only to the address of the borrowers which is provided in the deed of trust, despite the fact that the foreclosing party might know the borrower's current address.* V. 1 at 254. The trial court made three findings in its order granting partial summary judgment: (1) that Valley Bank had provided sufficient notice, as required by the deed of trust and Colorado law; (2) that Valley Bank had no knowledge of what address to send plaintiff Estates in Eagle Ridge its notice of foreclosure after Estates vacated the Fort Collins address provided in the deed of trust; and (3) Colorado law allows notice of foreclosure proceedings to be sent to the address provided by Estates in Eagle Ridge in the deed of trust, despite the bank's actual knowledge of the current address of plaintiff Estates in Eagle Ridge. V. 1 at 254.

Plaintiffs below filed a timely *pro se* Rule 59 motion, asking the court to reconsider and vacate its summary judgment order. On October 6, 2003 (e-filed October 9, 2003), the district court denied the Rule 59 motion to reconsider. V. 1 at 395.

Petitioners timely appealed from the judgment of the district court. That judgment was affirmed by the Colorado court of appeals and the Colorado supreme court subsequently denied the petition for writ of certiorari.

Respondent Valley Bank utilized the public trustee of Larimer County, Colorado and the Denver District Court to foreclose on a promissory note secured by a deed of trust on a parcel of land in Larimer County, Colorado. Valley

Bank's Verified Motion Authorizing Sale, *dated September 19, 2001*, submitted to the Denver District Court, provided testimony from Valley Bank attorney Richard Park that Exhibit C (listing 2629 Red Wing Road, Fort Collins, the deed of trust address) showed *the last known address* of Sharon Hamilton, Terry Hamilton, and Estates in Eagle Ridge, LLLP. That testimony was false, since Valley Bank had just personally served (in another related case) all three parties at the Hamilton residence in Modesto, California. V. 1 at 68-70. Further, the bank had received multiple written communications from Estates in Eagle Ridge, LLLP showing its new address as 5401 Hood Lane, in Fort Collins.

The Denver District Court issued an order authorizing sale by the public trustee of Larimer County. Respondent Valley Bank then provided that order and a certificate and affidavit to the public trustee, requesting the public trustee conduct the foreclosure sale, which it did.

Petitioners argued in their opening brief in the Colorado Court of Appeals that the foreclosure sale of the property should be set aside because petitioners were denied adequate notice of the foreclosure which they were due, notice required by the due process protections of the federal constitution:

> **Notice Of The Foreclosure Action Was Legally Insufficient**
>
> When notice is a person's due, notice which is a mere gesture does not constitute due process. *Rael v. Taylor*, 876 P.2d 1210, 1224 (Colo. 1994). The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. *Id.*

> Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less than likely than the mails to apprise them of its pendency. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 318 (1950). C.R.C.P. 120 does not abrogate the due process protections of the Fourteenth Amendment of the federal constitution or of the Colorado Constitution.
>
> Due process principles require plaintiffs in quiet title actions to make diligent efforts to ensure adequate notice to all potential defendants. In *American Land Co. v. Zeiss,* 219 U.S. 47 (1911), the Court reviewed the constitutionality of a 1906 California statute enacted in response to the "conditions caused in San Francisco by the great calamity of earthquake and fire" to "provide for the establishment and quieting of title to real property in case of the loss or destruction of public records." *Id. at 48-49.* The Supreme Court held that the statute satisfied due process criteria for notice because it imposed a "duty [on the person seeking to quiet title] to make diligent inquiry to ascertain the names of all claimants," which provision demonstrated "the careful purpose of the legislature to provide every reasonable safeguard for the protection of the rights of the unknown claimants and to give such notice as under the circumstances would be reasonably likely to bring the fact of the pendency and the purpose of the proceeding to the attention of those interested." *Id.*, at 66.

Opening Brief at 8-9.

On July 28, 2005, the court of appeals affirmed the district court on its first finding, that Valley Bank had provided adequate notice, and did not expressly rule on

the second and third findings. *The court of appeals held that notice of the default and foreclosure was adequate under Colorado law – and that this satisfies [federal] due process requirements* – because Colorado law allows the deed of trust provision for notice (which required borrowers to provide a formal notice of change of address to lenders, if they wanted notices of default and foreclosure sent to a new address), to control over what the lender's knowledge might actually be of the borrower's current address at the time of foreclosure. Slip Opinion at 11. The court of appeals did not discuss why the correspondence from the borrowers (Petitioners) to the Bank, discussing the loan, dated months and a week before the foreclosure was initiated, was not effective as a notice of change of address. The court of appeals held that "*the bank's adherence to the deed of trust notice provision (requiring formal written notice of a change of address from borrowers before the bank could be required to send notice to a new address – despite the bank's actual knowledge of a new address for borrowers) complied with the notice requirements of C.R.C.P. 120 (a) [Rule 120(a), Colorado Rules of Civil Procedure] – and, thus, did not violate plaintiffs' due process rights.*" Slip Opinion at 11.

The court of appeals decision is now reported in the Pacific Reporter and will stand as a published statement of Colorado law. The Colorado supreme court exercised its discretion and declined to hear the case, despite receiving notice of supplemental authority while the petition was pending, notice of this court's recent ruling in *Jones v. Flowers*, 126 S. Ct. 1708 (2006).

REASONS FOR ALLOWING THE WRIT

I. The Colorado court of appeals has in a published decision held that lenders can ignore their actual knowledge of a borrower's current address and send the borrower notice of default and foreclosure through the public trustee to the address provided by the borrower in the deed of trust, and foreclose on real property, even if the lender has actual knowledge that the address provided in the deed of trust is no longer valid, and even if the lender knows of the current address of the borrower, so long as the borrower has failed to provide the lender with formal written notice of a change of address. This decision informs all Colorado lenders that, in foreclosure proceedings, they can knowingly capitalize on a borrower's failure to send formal written notice of a change of address, knowing the address for notice provided in the deed of trust is obsolete, and take real property without ever making any effort to provide actual notice to the borrower of the default and foreclosure.

The decision of the Colorado court of appeals contradicts the teachings of this court. This court's recent decision in *Jones v. Flowers* interprets and applies the due process requirements articulated in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the requirement that the government provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *See generally Jones v. Flowers*, 126 S. Ct. 1708 (2006).

In *Jones*, this court held that Jones' failure to comply with a statutory obligation to keep his address updated did not forfeit his right to constitutionally sufficient notice. *Id.*, at 1717. The decision of the Colorado court of appeals appears to contradict this principle, finding that a borrower's *failure to comply with a contractual agreement* to provide formal written notice of a change of address, *forfeits the borrower's due process right* to receive actual notice of a loan default and foreclosure – even when the bank knows of the borrower's current address. Where a state had knowledge in a particular case that its statutory scheme (which required the owner to provide a current address to the state) would not provide actual notice of a vehicle forfeiture proceeding, that form of notice was constitutionally insufficient. *Robinson v. Hanrahan*, 409 U.S. 38, 40 (1972).

In *Jones*, this court stated that the state should have taken reasonable and practicable steps to provide notice of a tax sale, when it learned that its original notice to the property owner had not been received. *Jones*, 126 S. Ct. at 1718.

In this case, Petitioners provided evidence to the trial court in the form of affidavits that Valley Bank knew the address for notice provided in the deed of trust was no longer valid, and that Valley Bank had actual knowledge of current addresses where notice would likely be effective. The Colorado district court erred when holding that notice to the invalid address was adequate and that the bank could ignore its actual knowledge of the current address of the borrowers and the Colorado court of appeals erred when affirming that judgment. Colorado cannot authorize foreclosures through its courts and its public trustees

where those foreclosure proceedings fail to comply with federal due process requirements.

Although the bank is a private actor, where there is substantial involvement of state officials, state action may be found and federal due process protections must be satisfied. *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 486 (1988). Colorado's public trustee foreclosure process requires significant state assistance, including a court order authorizing the public trustee to conduct the sale, and including the actions of the public trustee, who is a government official appointed by the governor in larger counties [such as Larimer County, in this case] (§ 38-37-102(1), Colorado Revised Statutes); and who is the county treasurer in smaller counties (§ 38-37-102(2), Colorado Revised Statutes). See Rule 120, Colorado Rules of Civil Procedure; §§ 38-38-101, -103; -105, Colorado Revised Statutes. The notice of foreclosure sale which must be provided to the borrowers is a formal notice mailed to borrowers by the public trustee of the county. § 38-38-101(7)(a), Colorado Revised Statutes. The public trustee advertises the sale, receives the bids, disburses proceeds, and issues the deed. See generally §§ 38-38-101 through 38-38-704, Colorado Revised Statutes. Colorado's public trustee foreclosure process involves substantial state action and must, therefore, comply with federal due process requirements.

CONCLUSION

The writ should be allowed in order to enforce the Fourteenth Amendment's guarantee that no state can deprive a person of property without due process of law.

Dated this 27th day of November, 2006.

Respectfully submitted,

PAUL GRANT
6053 S. Quebec Street, # 101
Centennial, Colorado 80111
(303) 771-1908

Counsel for Petitioners

141 P.3d 838

COLORADO COURT OF APPEALS

Court of Appeals No.: 03CA2270
Larimer County District Court No. 02CV525
Honorable Daniel J. Kaup, Judge

Estates in Eagle Ridge, LLLP, a Colorado limited liability partnership; Terry D. Hamilton; and Sharon M. Hamilton,

Plaintiffs-Appellants,

v.

Valley Bank & Trust, a Colorado banking corporation,

Defendant-Appellee.

JUDGMENT AFFIRMED

Division IV
Opinion by: JUDGE LOEB
Casebolt and Russel, JJ., concur

Announced: July 28, 2005

Paul Grant, Englewood, Colorado, for Plaintiffs-Appellants.

Sherman & Howard, L.L.C., Joseph J. Bronesky, Denver, Colorado, for Defendant-Appellee.

Plaintiffs, Estates in Eagle Ridge, LLLP, Terry D. Hamilton, and Sharon M. Hamilton, appeal the summary judgment in which the district court concluded that notice to plaintiffs of foreclosure proceedings initiated by defendant, Valley Bank & Trust, was sufficient and that an order authorizing sale was valid. We affirm.

In 2000, Eagle Ridge, by its general partner Terry D. Hamilton, executed, as grantor, a deed of trust for certain property to the Larimer County public trustee for the benefit of Valley Bank to secure a $1,430,193 promissory note executed by Eagle Ridge and the Hamiltons. The deed of trust listed 2629 Redwing Road, Ste. 370, Ft. Collins, CO, as the address for Eagle Ridge and the Hamiltons.

In July 2001, after plaintiffs failed to make payments of interest and principal on the note, Valley Bank commenced public trustee foreclosure proceedings, pursuant to § 38-38-101, et seq., C.R.S. 2004, by sending to the public trustee a notice of election and demand for sale, a notice of right to cure and right to redeem, and other documents as required by statute. Valley Bank also sent copies of the notices to Eagle Ridge at the Redwing Road address.

In August 2001, Valley Bank instituted a C.R.C.P. 120 action in Larimer County to obtain the necessary court order authorizing sale of the property, pursuant to § 38-38-105, C.R.S. 2004. The same day, Valley Bank sent to the public trustee the motion for order authorizing sale, the notice for a C.R.C.P. 120 hearing, the certificate of mailing and posting, and the proposed order authorizing sale. Valley Bank sent copies of all its filings to plaintiffs at the Redwing Road address.

After failing to adhere to Larimer County's requirements concerning an order for hearing under C.R.C.P. 120, Valley Bank voluntarily decided not to pursue an order authorizing sale in the Larimer County C.R.C.P. 120 proceeding. Instead, Valley Bank filed another C.R.C.P. 120 action in Denver District Court in September 2001 and sent to the public trustee and to plaintiffs at the Redwing Road address, copies of the new motion for order

authorizing sale, notice regarding C.R.C.P. 120 hearing, certificate of mailing and posting, and proposed order authorizing sale.

All the pleadings filed in Denver District Court except one had a correct caption that identified that court as having jurisdiction over the C.R.C.P. 120 case. The one exception was the proposed order authorizing sale, which mistakenly listed Larimer County on the top of the caption.

Plaintiffs did not file a response to Valley Bank's C.R.C.P. 120 motion to authorize sale. A Denver District Court magistrate entered the order authorizing sale on October 15, 2001. The Larimer County public trustee then conducted a sale of the property.

In April 2002, plaintiffs filed this action in Larimer County to set aside the order authorizing sale, alleging that, because of the erroneous caption, the order was fraudulently entered by a magistrate who was not sitting on the Larimer County District Court.

Valley Bank then moved in Denver District Court, pursuant to C.R.C.P. 60(a), to correct the order to reflect the proper venue in the caption. The magistrate granted the motion and entered an amended order authorizing sale with a nunc pro tunc date of October 15, 2001.

Valley Bank then moved for partial summary judgment in this action, arguing that the error in the caption of the Denver District Court order was inconsequential and did not affect the validity of the order. Plaintiffs filed a cross-motion for summary judgment, arguing that the sale of the property was void because Valley Bank had not provided proper notice of the foreclosure.

The court denied Valley Bank's motion for partial summary judgment because of an issue of material fact regarding Valley Bank's knowledge of the change of plaintiffs' address. The court also denied plaintiffs' cross-motion for summary judgment, ruling that the error in the caption of the order authorizing sale was a clerical error that did not create a substantive defect in the foreclosure process.

Valley Bank subsequently filed a second motion for partial summary judgment, arguing that, pursuant to the notice provision in the deed of trust, Valley Bank's notice to plaintiffs of the C.R.C.P. 120 proceeding was sufficient as a matter of law. The court granted Valley Bank's motion. Plaintiffs moved for reconsideration of the summary judgment order, which the court denied. This appeal followed.

I. Timeliness of Appeal

Preliminarily, we address and reject Valley Bank's assertion that we should re-examine a previous order by a division of this court denying its motion to dismiss this appeal on the ground that plaintiffs' notice of appeal was not timely filed.

Valley Bank's motion to dismiss argued, inter alia, that plaintiffs failed to file their notice within the forty-five days allotted by C.A.R. 4(a). Plaintiffs filed their notice of appeal on November 24, 2003, forty-nine days after the trial court's October 6, 2003 order denying their motion for reconsideration under C.R.C.P. 59.

The motions division of this court ordered plaintiffs to show cause why the appeal should not be dismissed. After

both parties responded, the division discharged the order to show cause and denied Valley Bank's motion to dismiss.

Pursuant to C.A.R. 4(a), "[u]pon a showing of excusable neglect, the appellate court may extend the time for filing the notice of appeal by a party for a period not to exceed thirty days from the expiration of the time otherwise prescribed by this section (a)."

We interpret the division's order as extending the time for filing the notice of appeal because of excusable neglect, and, thus, we perceive no basis for re-examining the timeliness of the appeal.

II. Notice of Foreclosure

Plaintiffs contend that the district court erred in granting Valley Bank's second motion for partial summary judgment because the notices of the foreclosure proceedings were legally insufficient and, thus, violated plaintiffs' rights to due process. We are not persuaded.

Orders granting summary judgment are reviewed de novo. *Vail/Arrowhead, Inc. v. Dist. Court,* 954 P.2d 608 (Colo. 1998). Entry of summary judgment is proper only if there is a clear showing that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The burden to so demonstrate is upon the movant. C.R.C.P. 56(c); *Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Bd.,* 901 P.2d 1251 (Colo. 1995).

In granting summary judgment, the district court concluded as follows:

> 1. The Bank provided sufficient Notice of foreclosure proceedings, including its application for an Order Authorizing Sale under C.R.C.P. 120, as required by the Deed of Trust and Colorado law.
>
> 2. The Bank had no knowledge of the address at which Notice of foreclosure proceedings could be sent to Plaintiff Estates in Eagle Ridge LLLP, once it vacated the address listed in the Deed of Trust.
>
> 3. Colorado law allows a Notice to be sent to the address given in the Deed of Trust, despite the existence of any knowledge of a new address.

Plaintiffs contend that the court erred in each of these three conclusions. We conclude that the court properly granted summary judgment based on its first stated conclusion above, and, accordingly, we need not address the propriety of the court's second and third conclusions.

In Colorado, creditors may commence a foreclosure on a deed of trust through the office of the public trustee. The procedural requirements for a public trustee foreclosure are set forth in § 38-38-101, et seq., C.R.S. 2004. In addition, C.R.C.P. 120 outlines the procedure, including notice requirements, for obtaining a court order authorizing sale, which the creditor must obtain prior to the public trustee sale, pursuant to § 38-38-105.

Proper notice of an action is an elementary and fundamental requirement of due process. *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950). Notice must be made in a reasonable manner so as to convey the required information.

Process which is a mere gesture is not due process. *Mullane v. Cent. Hanover Bank & Trust Co., supra,* 339 U.S. at 315, 70 S. Ct. at 657.

The notice provisions of C.R.C.P. 120 comport with due process and, thus, must be strictly complied with by one seeking foreclosure under a power of sale through the public trustee. *Dews v. Dist. Court,* 648 P.2d 662 (Colo. 1982); *Valley Dev. at Vail, Inc. v. Warder,* 192 Colo. 316, 557 P.2d 1180 (1976).

We interpret a deed of trust using basic principles of contract interpretation. *Kirk v. Kitchens,* 49 P.3d 1189, 1192 (Colo. App. 2002). The intent of the parties to a contract is to be determined primarily from the language of the instrument itself. Written contracts that are complete and free from ambiguity will be found to express the intention of the parties and will be enforced according to their plain language. *Kirk v. Kitchens, supra.*

C.R.C.P. 120(a) requires a creditor to provide in its motion for an order authorizing sale the name and last known address, "as shown by the records of the moving party," of the grantor of the deed of trust, of the current record owner of the property to be sold, of any person believed or known to be personally liable on the indebtedness secured by the deed of trust, and of anyone else who has an interest in the property. Such records include the deed of trust. *See Motlong v. World Sav. & Loan Ass'n,* 168 Colo. 540, 544, 452 P.2d 384, 386 (1969) (notices of foreclosure mailed to debtor at address given in the deed of trust were all that is required under C.R.C.P. 120); *Watkins v. Booth,* 55 Colo. 91, 132 P. 1141 (1913) (proper notice mailed by public trustee to address given in the deed of trust). C.R.C.P. 120(b) requires notice of the proceeding

and any hearing date to be served on all persons listed in the motion at the addresses stated in the motion.

Section 38-38-101(1)(f), C.R.S. 2004, requires a creditor, once it has gathered the most recent addresses in its records, to provide the public trustee with "[a] list specifying the names and addresses to which all notices required by this article shall be mailed, which may be amended or supplemented in writing prior to the dates required for the mailing of such notices." Section 38-38-101(9), C.R.S. 2004, in turn, requires the public trustee to mail "all notices" pursuant to article 38 to the "names and addresses set forth on the list . . . as required by [§ 38-38-101(1)(f)]."

Here, in the deed of trust, the parties agreed that Valley Bank would provide all notices to plaintiffs at the Redwing Road address unless plaintiffs designated a different address in writing. Specifically, the deed of trust provides:

> Notices. Any notice required to be given under this Deed of Trust, including without limitation any notice of default and any notice of sale shall be given in writing, and shall be effective when delivered . . . or, if mailed, when deposited in the United States mail, as first class, certified or registered mail postage prepaid, directed to the addresses shown near the beginning of this Deed of Trust. Any party may change its address for notices under this Deed of Trust by giving formal written notice to the other parties, specifying that the purpose of the notice is to change the party's address.

The record shows, and neither party disputes, that plaintiffs no longer resided at the Redwing Road address

when Valley Bank instituted the C.R.C.P. 120 foreclosure proceedings. It is also undisputed that plaintiffs did not comply with the notice provision in the deed of trust by providing to Valley Bank, in writing, a notice of change of address. Valley Bank thus utilized the Redwing Road address to serve its C.R.C.P. 120 motion and notice and to provide the public trustee with plaintiffs' most current address, pursuant to § 38-38-101(1)(a).

We conclude that the plain language of the deed of trust expresses the parties' intentions concerning notice and changes of address and that Valley Bank's adherence to the deed of trust's notice provision complied with the notice requirements of C.R.C.P. 120(a) and, thus, did not violate plaintiffs' due process rights.

The notice provision in the deed of trust specified the parties' agreement that notice could be sent to plaintiffs' address in the deed of trust unless plaintiffs gave formal written notice to Valley Bank of a change of address for purposes of notice under the deed of trust. A written notice of change of address pursuant to that provision would have constituted part of Valley Bank's records under C.R.C.P. 120(a), because the notice provision effectively established the parties' agreement as to what records Valley Bank would have to consult to determine plaintiffs' address for purposes of C.R.C.P. 120. *Cf. Kirk v. Kitchens, supra* (unambiguous deed of trust will be held to express intention of the parties as to prepayment penalties and will be enforced according to its plain language).

We also find it instructive, although not determinative, that the Colorado State Real Estate Commission has approved for purposes of C.R.C.P. 120, a form deed of trust with a substantially similar notice provision to that agreed

to by the parties here. *See Colorado Real Estate Manual* ch. 25, at 200-08 (2004).

Accordingly, we conclude that the notice provision in the deed of trust, and Valley Bank's compliance with that provision, comported with the requirements of C.R.C.P. 120(a).

Nevertheless, plaintiffs contend that Valley Bank violated their due process rights by not making a reasonable effort to locate their most current mailing address. We are not persuaded.

Here, by the notice provision in the deed of trust, the parties agreed on a procedure for notifying one another of changes to their respective mailing addresses. Plaintiffs did not follow these procedures. We perceive nothing in C.R.C.P. 120 that required Valley Bank to go beyond the notice provision in the parties' agreement to locate a new address for plaintiffs. *See Kurtz v. Ripley County State Bank,* 785 F. Supp. 116, 118 (E.D. Mo. 1992) (the burden is not on the bank to keep track of debtor's ever changing address), *aff'd,* 972 F.2d 354 (8th Cir. 1992); *see also WTFO, Inc. v. Braithwaite,* 899 S.W.2d 709, 720 (Tex. App. 1995) (all that is required is constructive notice of foreclosure).

Accordingly, we perceive no due process concerns where plaintiffs' claim of insufficient notice arises out of their own failure to comply with the change of address requirements in the deed of trust. *See Klingbeil v. State,* 668 P.2d 930, 933 (Colo. 1983) (a university student whose permanent address was out-of-state bore the responsibility to give the traffic officer an address where notice of license suspension would reach him or leave a forwarding address with the university; the plaintiff "cannot now blame the

state for insufficient notice arising out of his own irresponsibility when the state complied with the procedural protections provided by statute"); *see also Ward v. Douglas County Bd. of Commr's,* 886 P.2d 310, 312 (Colo. App. 1994) (no due process violation where nondelivery of a notice denying the taxpayer's request for property tax abatement was "attributable to taxpayer's own failure to give the [board] an address where a mailed notice would reach him or to leave a forwarding address with the postal service").

Because we conclude that, as a matter of law, the trial court properly entered summary judgment for Valley Bank on the ground that Valley Bank's compliance with the notice provision in the deed of trust comported with due process and C.R.C.P. 120, we need not consider plaintiffs' arguments challenging the court's other bases for its summary judgment order.

III. Validity of Order Authorizing Sale

Plaintiffs also contend that the court erred in determining that the order authorizing sale was valid. Plaintiffs argue that the order signed by the Denver District Court magistrate on October 15, 2001, was "false and fraudulent" and entered without authority because it was not entered by the Larimer County District Court, the venue which Valley Bank erroneously identified on the caption of the proposed order. We are not persuaded.

Colorado law looks to the substance of a pleading and not to the form of its caption. *Hawkins v. State Comp. Ins. Auth.,* 790 P.2d 893, 894 (Colo. App. 1990) ("A pleading or court document should not stand or fall on the appellation it is given by a litigant. It is the substance of a document

that should control, rather than the title by which it is denominated.").

Moreover, under C.R.C.P. 60(a), courts have the power to correct a clerical error in an order: "Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders."

Here, we conclude the use of "Larimer County" in the caption of the order was a clerical error that did not affect its validity. *See Hawkins v. State Comp. Ins. Auth., supra.* Upon Valley Bank's C.R.C.P. 60(a) motion, the Denver District Court magistrate corrected the clerical error by issuing an amended order authorizing sale, nunc pro tunc.

Further, the mistake did not affect the jurisdiction or authority of the Denver District Court. Pursuant to C.R.C.P. 120(f), venue is not a jurisdictional consideration because a C.R.C.P. 120 foreclosure action may be filed in any county. The Denver magistrate was not purporting to act for the Larimer County District Court by signing the order. Rather, the magistrate was properly acting for the Denver District Court in a C.R.C.P. 120 proceeding properly filed in that court.

IV. Concurrent Jurisdiction

Finally, plaintiffs contend the order authorizing sale is void because the Denver District Court lacked subject matter jurisdiction to enter it in light of the pending Larimer County proceeding. Valley Bank argues that, because it voluntarily chose not to pursue the Larimer

County proceeding, the Denver District Court was not prohibited from entering the order. We agree with Valley Bank.

Initially, we reject Valley Bank's argument that plaintiffs did not preserve this issue for appellate review. Plaintiffs raised the issue in the trial court in their motion for reconsideration, and after oral argument, we directed the parties to file supplemental briefs on the issue. Accordingly, we conclude the issue is properly before us.

The exercise of concurrent jurisdiction is controlled by the principle of priority, which is sometimes referred to as the rule of exclusive concurrent jurisdiction. *See Utils. Bd. v. Southeast Colo. Power Ass'n,* 171 Colo. 456, 468 P.2d 36 (1970); *Martin v. Dist. Court,* 150 Colo. 577, 579, 375 P.2d 105, 106 (1962) ("the court first acquiring jurisdiction of the parties and the subject matter has exclusive jurisdiction, which perhaps more accurately should be denominated as a 'priority of jurisdiction' "); *see also* 20 Am. Jur. 2d Courts § 91 (2d ed. 2004). This rule is based on the public policies of preventing a conflict of decisions of two courts of concurrent jurisdiction and avoiding unnecessary duplication and multiplicity of suits. *See Pub. Serv. Co. v. Miller,* 135 Colo. 575, 577, 313 P.2d 998, 999 (1957); *Hursch v. Hursch,* 492 P.2d 860, 861 (Colo. App. 1971) (not published pursuant to C.A.R. 35(f)); *see also Plant Insulation Co. v. Fibreboard Corp.,* 224 Cal. App. 3d 781, 787, 274 Cal. Rptr. 147, 150 (1990) (the rule of exclusive concurrent jurisdiction is established and enforced not so much to protect the rights of parties as to protect the rights of courts to coordinate jurisdiction to avoid conflict of jurisdiction, confusion, and delay in the administration of justice).

As pertinent here, the rule of priority of jurisdiction is most often applied in Colorado where one court has already assumed jurisdiction over an action and there is a danger of inconsistent rulings when a second action is filed in another state court with concurrent jurisdiction. *See, e.g., Utils. Bd. v. Southeast Colo. Power Ass'n, supra*; *Pub. Serv. Co. v. Miller, supra; M & G Engines v. Mroch,* 631 P.2d 1177 (Colo. App. 1981). In such circumstances, the supreme court has recognized that the second action should be suspended or stayed rather than dismissed for lack of jurisdiction. *See Wiltgren v. Berg,* 164 Colo. 139, 145, 435 P.2d 378, 381 (1967); *Martin v. Dist. Court, supra,* 150 Colo. at 581, 375 P.2d at 107.

Here, the record shows that Valley Bank filed documents in Larimer County District Court in August 2001 to commence a C.R.C.P. 120 proceeding. The clerk of that court sent Valley Bank two letters notifying it that its documents were "incomplete" for lack of a proper order of hearing. The record further reflects that Valley Bank then abandoned its efforts in Larimer County and did not take any further action in that court. Instead, it filed a C.R.C.P. 120 proceeding in Denver in September 2001, and the Denver court entered an order authorizing sale in October 2001. In January 2002, the Larimer County District Court ordered that the C.R.C.P. 120 proceeding in that court would be dismissed without prejudice unless it was reset for hearing, and in February 2002, the court dismissed it. The record does not reflect that plaintiffs sought to stay or suspend the C.R.C.P. 120 proceeding filed in Denver.

Under these circumstances, we conclude the rule of priority of jurisdiction did not divest the Denver District Court of jurisdiction to enter the order authorizing sale. There was no risk of inconsistent decisions or duplicative

lawsuits because Valley Bank had abandoned its efforts to obtain an order authorizing sale from the Larimer County Court and, indeed, had not even filed the necessary documentation to allow it to obtain such an order from that court. *Cf. People ex rel. Maddox v. Dist. Court,* 198 Colo. 208, 211-12, 597 P.2d 573, 575 (1979) (Arapahoe County District Court not required to defer to the exclusive jurisdiction of the Denver Juvenile Court where the juvenile court never took jurisdiction of the case because the appropriate documentation was not filed to transfer jurisdiction to that court). Thus, the policy reasons for the rule are not implicated here. Accordingly, the Denver District Court had jurisdiction to enter the order authorizing sale in the C.R.C.P. 120 proceeding filed in that court.

Because of our resolution of this issue, we need not consider Valley Bank's alternative argument that the rule of priority of jurisdiction is inapplicable to C.R.C.P. 120 proceedings.

The judgment is affirmed.

Judge CASEBOLT and Judge RUSSEL concur.

DISTRICT COURT, COUNTY OF LARIMER, STATE OF COLORADO 201 LaPorte Avenue Ft. Collins, CO 80521 970-498-6100	
Plaintiff: Estates in Eagle Ridge LLLP, a Colorado Limited Liability Partnership, Terry D. Hamilton, and Sharon M. Hamilton v. **Defendants:** Angela Dazlich, as the Public Trustee of Larimer County, and Valley Bank & Trust, a Colorado corporation,	▯ COURT USE ONLY ▯ Case Number: 2002 CV 525 Division: 4C
ORDER GRANTING VALLEY BANK & TRUST'S SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT	

(Filed Aug. 14, 2003)

Defendant Valley Bank & Trust has filed a Second Motion for Partial Summary Judgment regarding the remaining issues of plaintiffs' Complaint. At a telephone conference on January 21, 2003, this Court found that issues still remained regarding the knowledge which the Bank had regarding the address of Plaintiff Estates in Eagle Ridge LLLP.

The Second Motion for Partial Summary Judgment, affidavit supporting this Motion, and memorandum Brief establish the following:

1. The Bank provided sufficient Notice of foreclosure proceedings, including its application for an Order Authorizing Sale under C.R.C.P. 120, as required by the Deed of Trust and Colorado law.

2. The Bank had no knowledge of the address at which Notice of foreclosure proceedings could be sent to Plaintiff Estates in Eagle Ridge LLLP, once it vacated the address listed in the Deed of Trust.

3. Colorado law allows a Notice to be sent to the address given in the Deed of Trust, despite the existence of any knowledge of a new address.

Partial Summary Judgment is hereby GRANTED in favor of Defendant Valley Bank & Trust and against Plaintiffs. The remaining allegations of Plaintiffs' Complaint are dismissed, with prejudice.

Valley Bank & Trust has advised this Court that it does not desire to pursue its Counterclaim in this action, as it intends to enforce any right to recover attorney fees in another action that is currently pending in Weld County. Accordingly, the Counterclaim is dismissed, without prejudice.

Entered this 14 day of ~~July~~ Aug 2003.

/s/ Daniel J. Kaup
Daniel J. Kaup, District Judge

COLORADO COURT OF APPEALS
No. 03CA2270

September 22, 2005
ORDER DENYING
PETITION FOR REHEARING

ESTATES IN EAGLE RIDGE LLLP, A COLORADO LIMITED, LIABILITY PARTNERSHIP, TERRY D. HAMILTON, SHARON M. HAMILTON,
PLAINTIFF-APPELLANT
v.
VALLEY BANK & TRUST, A COLORADO BANKING, CORPORATION,
DEFENDANT-APPELLEE

Appeal from the LARIMER COUNTY
Honorable DANIEL J KAUP, Judge
No. 02CV525

The PETITION FOR REHEARING filed in this appeal by:

ESTATES IN EAGLE RIDGE LLLP/
PLAINTIFF-APPELLANT

is DENIED.

Issuance of the Mandate is stayed until: October 24, 2005

If a Petition for Certiorari is timely filed with the Supreme Court of Colorado, then the stay shall remain in effect until disposition of the cause by that Court.

By the Court:

LOEB, J.
CASEBOLT, J.
RUSSEL, J.

SUPREME COURT, STATE OF COLORADO TWO EAST 14TH AVENUE DENVER, COLORADO 80203 CERTIORARI TO THE COURT OF APPEALS, 03CA2270 DISTRICT COURT, LARIMER COUNTY 02CV525	CASE NO. 05SC752
Petitioners: ESTATES IN EAGLE RIDGE LLLP, a Colorado limited liability partnership, TERRY D. HAMILTON; and SHARON M. HAMILTON, v. **Respondents:** ANGEL DAZLICH, as the Public Trustee of Larimer County; and VALLEY BANK AND TRUST, a Colorado corporation.	
ORDER OF COURT	

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, AUGUST 28, 2006.

[SEAL]

Copies mailed via the State's Mail Services Division on 08/28/06. KLM

Paul Grant
6053 S. Quebec St., Ste. 101
Englewood, CO 80111

Loren B. Schall
Assistant District Attorney
201 LaPorte Ave., Ste. 200
Fort Collins, CO 80521

Joseph J. Bronesky
Sherman & Howard LLC
633 17th St., #3000
Denver, CO 80202

Clerk of the Court
Colorado Court of Appeals

Honorable Daniel J. Kaup
Larimer County Justice Center
201 La Porte Ave., Ste. 110
Fort Collins, CO 80521

Clerk of the Court
Larimer County Justice Center
201 La Porte Ave., Ste. 110
Fort Collins, Co 80521

C.R.S. § 38-38-101. Owner of evidence of debt may elect to foreclose – notice – record of sale – withdrawal

(1) Whenever the owner of an evidence of debt which is secured by a deed of trust containing a power of sale declares a violation of any of the covenants of such deed of trust and elects to advertise all or a portion of the property therein described for sale, such owner shall file with the public trustee of the county wherein such property is located:

(a) Two notices of election and demand for sale, which shall be originally executed by the owner of the evidence of debt which is secured by such deed of trust or the agent or attorney for such owner;

(b) The original evidence of debt, such as a note or bond, or, in lieu thereof, one of the following:

(I) A corporate surety bond issued by a company authorized to issue such bonds in the state of Colorado in one and one-half times the face amount of such original evidence of debt; or

(II) A copy of the evidence of debt together with a certification from the owner of the evidence of debt or the agent or attorney for such owner that the owner is an entity described in subsection (1.5) of this section, is the owner and holder of the original evidence of debt, the copy of the evidence of debt is true and correct, and the use of the copy of the evidence of debt is subject to the conditions described in subsection (1.6) of this section. Following the foreclosure sale, a copy of the evidence of debt, either marked as cancelled or showing the amount of any deficiency, shall be attached to and recorded by the public

trustee with the duplicate certificate of purchase as required by section 38-38-401.

(c) The original deed of trust securing such evidence of debt or a copy thereof certified as true and correct by the county clerk and recorder of the county where such deed of trust was recorded;

(d) A certificate executed by the owner of the evidence of debt secured by such deed of trust, or the agent or attorney for such owner, which states to the best of the knowledge of the person executing such certificate the name and address of the current owner of the property described in the notice of election and demand for sale;

(e) An affidavit executed by the owner of the evidence of debt secured by such deed of trust, or the agent or attorney for such owner, which states the outstanding principal balance due and owing upon the evidence of debt secured by such deed of trust; and

(f) A list specifying the names and addresses to which all notices required by this article shall be mailed, which may be amended or supplemented in writing prior to the dates required for the mailing of such notices.

(1.5) The following entities may elect to file with the public trustee a copy of the original evidence of debt in lieu of the original and the certification required by paragraph (b) of subsection (1) of this section:

(a) A bank, as defined in section 11-101-401(5), C.R.S.;

(b) An industrial bank, as defined in section 11-108-101(1), C.R.S.;

(c) A savings and loan association licensed to do business in Colorado;

(d) A supervised lender, as defined in section 5-1-301(46), C.R.S., that is licensed to make supervised loans pursuant to section 5-2-302, C.R.S., and that is either:

(I) A public entity, defined as an entity that has issued voting securities that are listed on a national security exchange registered under the federal "Securities Exchange Act of 1934"; or

(II) An entity in which all of the outstanding voting securities are held, directly or indirectly, by a public entity;

(e) An entity in which all of the outstanding voting securities are held, directly or indirectly, by a public entity also owning, directly or indirectly, all of the voting securities of a supervised lender, as defined in section 5-1-301(46), C.R.S., that is licensed to make supervised loans pursuant to section 5-2-302, C.R.S.;

(f) A federal housing administration approved mortgagee;

(g) A federally-chartered credit union doing business in Colorado or a state-chartered credit union, as defined in section 11-30-101, C.R.S.;

(h) An agency of the federal government; or

(i) A federally-created corporation that originates, guarantees, or purchases loans.

(1.6) Any owner of an evidence of debt who elects to foreclose without the original evidence of debt pursuant to paragraph (b) of subsection (1) of this section and

subsection (1.5) of this section shall by operation of law be deemed to have agreed to indemnify and defend any person liable for repayment of any portion of the original evidence of debt in the event that the original evidence of debt is presented for payment for any amount other than a noted deficiency following issuance of a certificate of purchase pursuant to section 38-38-401 and any person who sustains a loss due to any title defect that results from reliance upon a foreclosure sale at which the original evidence of debt was not presented. Such indemnity shall be limited to actual economic loss suffered together with any court costs and reasonable attorney fees incurred in defending a claim brought as a direct and proximate cause of the failure to produce the original evidence of debt. The public trustee shall be immune from any claims for liability or damages resulting from any injury as described under this subsection (1.6).

(1.7) In the event that the owner of an evidence of debt commences a foreclosure without production of the original evidence of debt, the owner of the evidence of debt may submit the original evidence of debt to the public trustee or sheriff prior to the occurrence of the foreclosure sale. In such event, the sale shall be conducted and administered as if the original evidence of debt had been submitted at the time of commencement of such proceeding and any indemnities deemed to have been given by the owner of the evidence of debt under subsection (1.6) of this section shall be considered null and void.

(1.8) In the event that a foreclosure is conducted by an alleged owner of the evidence of debt where the evidence of debt has not been produced and it is subsequently determined that the alleged owner was not the true and lawful owner of the evidence of debt, the only claims for

the true and lawful owner of the evidence of debt shall be solely against the indemnitor as provided in subsection (1.6) of this section and not against the real property. Nothing in this section shall preclude a person liable for repayment of the evidence of debt from pursuing remedies allowed by law, including, but not limited to, actions for fraud.

(2) Only for the purposes of articles 37 to 40 of this title, the following shall be presumed to be the owner of such evidence of debt:

(a) The person who is the obligee of and who is in possession of an original evidence of debt;

(b) The person in possession of an original evidence of debt together with an original assignment or conveyance thereof to such person; or

(c) The person in possession of a negotiable instrument evidencing a debt which has been duly negotiated to such person or to bearer or indorsed in blank.

(3) Within ten working days following the receipt of such notice of election and demand for sale, the public trustee shall commence a foreclosure proceeding by causing a copy of the same to be recorded in the office of the county clerk and recorder of the county in which the property described in such notice of election and demand for sale is located, and the recording fee for the same shall be collected as part of the expense of such sale.

(4) The public trustee shall thereupon publish a notice of sale which advertises the property described in such notice of election and demand for sale in accordance with the terms of sale specified in such deed of trust; except that such sale shall be held at the place designated

in section 38-38-110, and the notice of sale shall designate the actual place of sale, the date and time of sale, and the recording information of the deed of trust being foreclosed and shall comply with section 24-70-109, C.R.S.

(5) The date specified in the notice of sale by the public trustee for the sale of property by virtue of the foreclosure of a deed of trust shall be fixed in accordance with the provisions of section 38-38-108.

(6) Unless a longer period of advertising is prescribed in a deed of trust, all deeds of trust shall be deemed to prescribe advertising the notice of sale in some newspaper of general circulation in the county or counties in which the property described in such notice of sale is located for four weeks, which means publication once each week, for five successive weeks. The fees to be allowed for printing such notices of sale shall be as provided by law for the publication of the legal notices or advertising. It is a duty of the public trustee to audit all bills for printing such notices of sale.

(7)(a) The public trustee, within twenty days after the date of the first publication of the notice of sale, shall mail a copy of such notice as it appeared in a newspaper of general circulation to the grantor at the address given in the deed of trust, and the public trustee shall also mail a like notice to each person who appears to have acquired a record interest in the property described in such notice of sale subsequent to the recording of such deed of trust, whether by deed, mortgage, judgment, or any other instrument of record, and, if the foreclosing party has a lien with priority over the lessee or lessees who have unrecorded possessory interests in the property being foreclosed and desires to terminate such possessory interests

with the foreclosure, as evidenced by the inclusion of the names of the lessee or lessees or the occupant or occupants in the list supplied the public trustee pursuant to subsection (1) of this section, the public trustee shall also mail such a notice to the lessee or lessees of the premises as provided in section 38-38-305 (1.5). Such notice shall be mailed to such person at the address given in the recorded instrument, or, if such notice is being sent to the lessee or lessees of the premises, such notice shall be mailed as provided in section 38-38-305 (1.5). Postage costs under this section shall be part of foreclosure costs. If such recorded instrument does not give such address or if only the county and state are given as the address of such person, it will not be necessary to mail any notice to such person. It is not necessary to mail a copy of said printed notice to any person whose interest does not appear of record at the time said notice of election and demand for sale is recorded.

(b) At the request of the owner of an evidence of debt which is secured by the deed of trust being foreclosed, the public trustee shall correct any errors in the published notice of sale and shall postpone the original sale to a future date so as to permit a corrected notice of sale to be published in accordance with subsection (6) of this section, which future date may be subsequent to the expiration of the sixty-day period prescribed by section 38-38-108(1), if necessary, but in no event later than thirty days after the fifth publication of the corrected notice of sale. The public trustee shall mail a copy of the corrected notice of sale as it appears in a newspaper of general circulation within ten days of the first correct publication in the same manner as set forth in paragraph (a) of this subsection (7). On the originally scheduled sale date as stated in the incorrect

publication of the notice of sale, the public trustee shall make an oral announcement of the date and time of said postponed sale.

(8) The public trustee shall secure one originally executed copy of the notice of election and demand for sale and also a printed copy of the notice of sale as published in a book to be kept for that purpose, which book shall be open for the inspection of the public at all reasonable hours.

(9) All notices which the public trustee is required by law to mail pursuant to this article shall be mailed to the names and addresses set forth on the list, as amended or supplemented, required by paragraph (f) of subsection (1) of this section. The public trustee shall have no liability for any errors or omissions in the names and addresses set forth on said list, as amended or supplemented.

(10) Whenever such public trustee makes a sale of the property described in a deed of trust, such public trustee shall enter in a book to be kept for that purpose a record of the name of the person executing such deed of trust, the date thereof, a brief description of the property therein described, the date of the sale, the name of the newspaper printing the notice of the sale, a list of the names and addresses of the persons to whom the printed notice was mailed, the name and last post-office address of the purchaser at such sale, and the amount at which such property was sold in separate parcels, if so sold, or en masse. The public trustee shall not be entitled to any fees whatever for keeping such notice or record.

(11) Whenever the owner of an evidence of debt which is secured by a deed of trust files with the public trustee, prior to the sale, a written withdrawal of the

notice of election and demand for sale, the foreclosure proceedings shall thereupon terminate. The public trustee shall record the withdrawal and collect all expenses actually incurred and, in addition thereto, a withdrawal fee equal to the amounts authorized under section 38-37-104(1)(b) and, if applicable, section 38-38-104(2)(c)(II).

(12) The owner of an evidence of debt which is secured by a deed of trust may not elect to foreclose the lien of said deed of trust against only a portion of the property encumbered by said deed of trust unless such portion is so encumbered as a separate and distinct parcel or lot by the original or an amended deed of trust. Any foreclosure conducted by a public trustee pursuant to a power of sale contained in a deed of trust against less than all of the property then encumbered by the lien of such deed of trust shall not affect the lien of such deed of trust nor the power of sale contained therein as to the remaining property.

(13) Any notice of election and demand for sale filed with the public trustee and any notice of sale published and mailed in accordance with the provisions of this section shall contain the following:

(a) A statement that the property described in such notices is all of the property then encumbered by the lien of the deed of trust or a statement that the property described in such notices is only a portion of the property then encumbered by the lien of the deed of trust; and

(b) A statement of the amount of the outstanding principal balance due and owing upon the evidence of debt secured by the deed of trust being foreclosed as set forth in the affidavit required by paragraph (e) of subsection (1) of this section.

(14) In the event that the amount of the outstanding principal balance due and owing upon the evidence of debt secured by the deed of trust being foreclosed is erroneously set forth in the statement required by paragraph (b) of subsection (13) of this section, such error shall not affect the validity of the notice of election and demand for sale, the notice of sale, any other documents executed in connection therewith, or any public trustee sale which may be held pursuant to such notices.

Editor's note: This version of this section is effective until July 1, 2007.

C.R.S. § 38-38-103. Combined notice of right to cure and right to redeem

(1)(a) Within twenty days after the recording of the notice of election and demand for sale by the public trustee pursuant to section 38-38-101, or not less than sixteen nor more than twenty-five days after the entry of a decree of foreclosure or the issuance of a writ of execution directing the sheriff to sell real property, the public trustee or sheriff shall mail a notice to the grantors of the deed of trust or mortgage being foreclosed, to any subsequent owners of the property being foreclosed, to the current owner of the property being sold, and to any other person having a right to cure a default under section 38-38-104 or a right to redeem the property subject to foreclosure under section 38-38-302, 38-38-303, 38-38-305, or 38-38-306. Such notice shall contain:

(I) The names of the grantors of the deed of trust or mortgage and the original beneficiaries or grantees thereof;

(II) The name of the current owner of an evidence of debt secured by the deed of trust or mortgage being foreclosed or the owner of the lien being foreclosed;

(III) A statement that the notice of intention to redeem filed pursuant to section 38-38-302 shall be filed at least fifteen calendar days prior to the end of the owner's redemption period;

(IV) A Statement that the notice of intent to cure pursuant to section 38-38-104 shall be filed at least fifteen calendar days prior to the date upon which the foreclosure sale is set; and

(V) The names, addresses, and telephone numbers of the attorneys, if any, representing the foreclosing lienor.

(b) A legible copy of this section and sections 38-37-108, 38-38-104, and 38-38-301 to 38-38-306 shall be sent with the notice specified in paragraph (a) of this subsection (1).

(2) The combined notice required by subsection (1) of this section shall be mailed to those persons who have a right to cure or redeem pursuant to an instrument evidencing such right which was recorded with the county clerk and recorder of the county in which said property is located subsequent to the recording of the deed of trust, mortgage, or other lien being foreclosed and prior to the recording of the notice of election and demand for sale or notice of commencement of the pending foreclosure action (lis pendens). Such combined notice shall be mailed to such persons at their respective addresses shown in the recorded instruments through which their rights to cure or redeem are derived. Postage costs under this section shall be part of the foreclosure costs.

Editor's note: This version of this section is effective until July 1, 2007.

C.R.S. § 38-38-105. Court order authorizing sale mandatory

Whenever a public trustee forecloses upon a deed of trust under this article, the holder of the evidence of debt or the attorney for the holder shall obtain an order authorizing sale from a court of competent jurisdiction to issue the same pursuant to rule 120 of the Colorado rules of civil procedure. The order shall recite the date the hearing was scheduled if no response was filed, or the date the hearing was completed if a response was filed, which date in either case must be no later than the day prior to the last day on which an effective notice of intent to cure may be filed with the public trustee under section 38-38-104. The holder or the attorney for the holder shall cause a copy of the order to be provided to the public trustee no later than 12 noon on the second business day prior to the date of sale. A sale held in violation of this section shall be invalid.

HISTORY: Source: L. 90, Entire article R&RE, p. 1657, § 2, effective October 1.L. 2006: Entire section amended, p. 1452, § 11, effective July 1.

Editor's note: This section was contained in an article that was repealed and reenacted in 1990. Provisions of this section, as it existed in 1990, are similar to those contained in 38-37-140(1) as said section existed in 1989, the year prior to the repeal and reenactment of this article.

Cross references: For the nature and effect of mortgages, see § 38-35-117.

C.R.C.P. Rule 120. Orders Authorizing Sales Under Powers.

(a) Motion; Contents. Whenever an order of court is desired authorizing a sale under a power of sale contained in an instrument, any interested person or someone on such person's behalf may file a verified motion in a district court seeking such order. The motion shall be accompanied by a copy of the instrument containing the power of sale, shall describe the property to be sold, and shall specify the default or other facts claimed by the moving party to justify invocation of the power of sale. When the property to be sold is personal property, the motion shall state the names and last known addresses, as shown by the records of the moving party, of all persons known or believed by the moving party to have an interest in such property which may be materially affected by such sale. When the property to be sold is real property and the power of sale is contained in a deed of trust to a public trustee, the motion shall state the name and last known address, as shown by the records of the moving party, of the grantor of such deed of trust, of the current record owner of the property to be sold, and of any person known or believed by the moving party to be personally liable upon the indebtedness secured by the deed of trust, as well as the names and addresses of those persons who appear to have acquired a record interest in such real property, subsequent to the recording of such deed of trust and prior to the recording of the notice of election and demand for sale, whether by deed, mortgage, judgment or any other instrument of record. In giving notice to persons who appear to have acquired a record interest in real property, the address of each such person shall be the address which is given in the recorded instrument evidencing such person's interest, except that if such recorded instrument does not give an

address or if only the county and state are given as the address of such person, no address need be stated for such person in the motion. The clerk shall fix a time not less than 20 nor more than 30 days after the filing of the motion, and a place for the hearing of such motion.

(b) Notice; Contents; Service. The moving party shall issue a notice describing the instrument containing the power of sale, the property sought to be sold thereunder, and the default or other facts upon which the power of sale is invoked. The notice shall also state the time and place set for the hearing and shall refer to the right to file and serve responses as provided in section (c), including a reference to the last day for filing such responses and the addresses at which such responses must be filed and served. The notice shall contain the following advisement: "If this case is not filed in the county where your property is located, you have the right to ask the court to move the case to that county. Your request may be made as a part of your response or any paper you file with the court at least five days before the hearing." The notice shall contain the return address of the moving party. Such notice shall be served by the moving party not less than 15 days prior to the date set for the hearing, by mailing a true copy thereof to each person named in the motion (other than persons for whom no address is stated) at the address or addresses stated in the motion and by filing a copy with the clerk and by delivering a second copy to the clerk for posting by the clerk. Such mailing and delivery to the clerk for posting shall be evidenced by the certificate of the moving party or moving party's agent.

(c) Response; Contents; Filing and Service. Not less than 5 days prior to the date set for the hearing, said interval including intermediate Saturdays, Sundays, and

legal holidays, C.R.C.P. 6(a) notwithstanding, any interested person who disputes, on grounds within the scope of the hearing provided for in section (d), the moving party's entitlement to an order authorizing sale may file and serve a response to the motion, verified by the oath of such person, setting forth the facts upon which he relies and attaching copies of all documents which support his position. Service of such response upon the moving party shall be made in accordance with C.R.C.P. 5(b). C.R.C.P. 6(e) shall not apply to computation of time periods under this section (c).

(d) Hearing; Scope of Issues; Order; Effect. At the time and place set for the hearing or to which the hearing may have been continued, the court shall examine the motion and the responses, if any. The scope of inquiry at such hearing shall not extend beyond the existence of a default or other circumstances authorizing, under the terms of the instrument described in the motion, exercise of a power of sale contained therein, and such other issues required by the Soldiers' and Sailors' Civil Relief Act of 1940, as amended. The court shall determine whether there is a reasonable probability that such default or other circumstance has occurred, and whether an order authorizing sale is otherwise proper under said Soldiers' and Sailors' Civil Relief Act, as amended, and shall summarily grant or deny the motion in accordance with such determination. Neither the granting nor the denial of a motion under this Rule shall constitute an appealable order or judgment. The granting of any such motion shall be without prejudice to the right of any person aggrieved to seek injunctive or other relief in any court of competent jurisdiction, and the denial of any such motion shall be without prejudice to any right or remedy of the moving

party. The court shall not require the appointment of an attorney to represent any interested person as a condition of granting such motion, unless it appears from the motion or other papers filed with the court that there is a reasonable probability that the interested person is in the military services.

(e) Hearing Dispensed with if no Response Filed. If no response has been filed within the time permitted by section (c), the court shall examine the motion and, if satisfied that venue is proper and the moving party is entitled to an order authorizing sale upon the facts stated therein, the court shall dispense with the hearing and forthwith enter an order authorizing sale.

(f) Venue. For the purposes of this section, a consumer obligation is any obligation (i) as to which the obligor is a natural person, and (ii) is incurred primarily for a personal, family, or household purpose. Any proceeding under this Rule involving a consumer obligation shall be brought in and heard in the county in which such consumer signed the obligation or in which the property or a substantial part thereof is located. Any proceeding under this Rule which does not involve a consumer obligation or an instrument securing a consumer obligation may be brought and heard in any county. However, in any proceeding under this Rule, if a response is filed, and if in the response or in any other writing filed with the court, the responding party requests a change of venue to the county in which the encumbered property or a substantial part thereof is situated, the court shall order transfer of the proceeding to such county.

(g) Return of Sale. The court shall require a return of such sale to be made to the court, and if it appears

therefrom that such sale was conducted in conformity with the order authorizing the sale, the court shall thereupon enter an order approving the sale.

(h) Docket Fee. A docket fee in the amount specified by law shall be paid by the person filing such motion. Unless the court shall otherwise order, any person filing a response to the motion shall pay, at the time of the filing of such response, a docket fee in the amount specified by law for a defendant or respondent in a civil action under section 13-32-101(1)(d), C.R.S.

HISTORY: Source: (b), (e), and (f) amended February 7, 1991, effective June 1, 1991; (a) amended February 17, 1993, effective April 1, 1993; (a) amended and adopted, effective November 16, 1995.

COLORADO REVISED STATUTES 38-37-102. Appointment – bond – office

(1) The governor shall appoint a public trustee in and for each of the counties of the first and second classes for the term of two years. However, the term of any public trustee in and for a county of the first or second class appointed on or after February 1, 1989, but before February 1, 1991, shall expire on February 1, 1991. All appointments of public trustees in and for counties of the first and second classes on or after February 1, 1991, shall be for terms of four years, with the first such term beginning on February 1, 1991. If the office of public trustee in and for any county of the first or second class should become vacant on or after February 1, 1991, the governor shall appoint a successor to complete the four-year term. The governor shall appoint as public trustees only those persons who have at least a four-year college degree and five years' administrative or business experience or, in the alternative, ten years' administrative or business experience. Any person so appointed public trustee may be removed from office by the governor upon good cause shown therefor. Every person so appointed public trustee in counties of the first and second classes shall, before entering upon the duties of such office, execute a surety bond issued by a company authorized to issue such bonds in the state of Colorado, in the sum of twenty-five thousand dollars, conditioned, in both classes of counties, that the person so appointed as public trustee will well and faithfully execute the duties of such office; and such public trustee shall promptly account for and pay over to such persons as are entitled thereto all moneys and other valuables that come into such person's hands as public trustee.

(2) The county treasurer shall be the public trustee in each of the counties other than those of the first and second classes, and each such county treasurer as public trustee shall execute a surety bond issued by a company authorized to issue such bonds in the state of Colorado in the sum of ten thousand dollars, to be approved by the county commissioners of the county, conditioned that such person will well and faithfully perform the duties of public trustee and properly account for and pay over to such persons as are entitled thereto all moneys and other valuables that come into such person's hands as public trustee. In counties wherein the county treasurer is the public trustee, as provided in this subsection (2), such person shall conduct the duties of public trustee at the office of the county treasurer; and, in counties of the first and second classes, the public trustee shall maintain an office and regular place of business for the performance of the public trustee's official duties; and, in all cases, the office of the public trustee shall be kept open for the transaction of business during ordinary business hours each day, except Saturdays, Sundays, and legal holidays.

(3) The board of county commissioners shall furnish, at the expense of the county, all office supplies, including books, forms, and stationery necessary for the use of the public trustee in carrying out the provisions of this section and *sections 38-37-101* and *38-37-104*, subject to the provisions of *section 38-37-104(3)*.

No. 06-752

In The

Supreme Court of the United States

ESTATES IN EAGLE RIDGE, LLLP, et al.,

Petitioners,

v.

VALLEY BANK & TRUST,

Respondent.

On Petition For A Writ Of Certiorari To The Colorado Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOSEPH J. BRONESKY
SHERMAN & HOWARD, L.L.C.
633 Seventeenth Street, Suite 3000
Denver, Colorado 80202
(303) 297-2900

QUESTIONS PRESENTED

I. Have Petitioners presented compelling reasons to grant the Petition where the decision of the Colorado Court of Appeals does not conflict with any decisions of this Court, and where Petitioners do not claim that the decision implicates an important federal question that has not been settled by this Court?

II. Have Petitioners presented compelling reasons to grant the Petition where the record demonstrates that they were aware of, and participated in, the foreclosure proceedings for which they now claim they did not receive notice in accordance with their right to due process of law?

III. Have Petitioners presented compelling reasons to grant the Petition where they seek only to overturn the factual determinations of the Larimer County, Colorado, District Court?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Valley Bank & Trust is a wholly-owned subsidiary of Valley Bancorp, Inc. No publicly-held corporation owns 10% or more of the stock of Valley Bank & Trust.

TABLE OF CONTENTS

	Page
Questions Presented	i
Corporate Disclosure Statement Pursuant to Supreme Court Rule 29.6	ii
Statement of the Case	1
Reasons for Denying the Writ	7
A. The Writ Should Be Denied Because the Decision of the Colorado Court of Appeals Does Not Conflict with Relevant Decisions of this Court.	7
B. The Writ Should Be Denied Because Petitioners Seek to Overturn the Factual Findings of the Larimer County District Court.	10
C. The Writ Should Be Denied Because Further Discovery Will Contradict the Representations That Petitioners Have Made to this Court.	13
Conclusion	14

TABLE OF AUTHORITIES

Page

CASES

Conrad v. Imatani, 724 P.2d 89 (Colo. Ct. App. 1986) 11

Dusenbery v. United States, 534 U.S. 161 (2002) 7

Estates in Eagle Ridge, LLLP v. Valley Bank & Trust, 141 P.3d 838 (Colo. Ct. App. 2005) 6, 7

Jones v. Flowers, 126 S. Ct. 1708 (2006) 8, 10

Little v. Fellman, 837 P.2d 197 (Colo. Ct. App. 1991) 11

Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983) 7

Moreland v. Marwich, Ltd., 665 P.2d 613 (Colo. 1983) 5

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 7

Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478 (1988) 7

STATUTES

C.R.S. § 38-38-101 3

C.R.S. § 38-38-105 4

C.R.S. § 38-38-109 13

C.R.S. § 38-38-302 14

STATEMENT OF THE CASE

This case involves two separate summary judgment rulings of the Larimer County, Colorado, District Court. On February 19, 2003, the court ruled that an error in the caption of a court order that authorized a sale under a deed of trust did not create a substantive defect in the foreclosure process. Petitioners are not challenging this ruling. On August 14, 2003, the court ruled that the Public Trustee of Larimer County (the "Public Trustee") and Valley Bank & Trust ("Valley Bank" and "the Bank") had provided adequate notice of the foreclosure proceedings pursuant to the provisions of the deed of trust and Colorado foreclosure statutes and rules.

The Provisions of the Deed of Trust

On November 3, 2000, Petitioner Estates in Eagle Ridge LLLP executed a deed of trust to the Public Trustee of Larimer County for the benefit of Valley Bank to secure a $1,430,193.00 note. The deed of trust purportedly covered more than 200 acres of raw land in Larimer County, Colorado. Petitioners Terry Hamilton and Sharon Hamilton are co-makers of the note. They also pledged ten shares of the capital stock of the North Poudre Irrigation Company as security.

The loan agreement that the parties signed at the same time as the note allowed Valley Bank to advance additional sums up to the face amount of the promissory note to cover monthly interest payments. As of March 30, 2001, Valley Bank had advanced $1,422,553.97 to pay off prior debts and to cover monthly principal and interest payments. But the Bank decided at that time that it should not advance any more money because Estates in

Eagle Ridge had not made any payments of its own on the loan, it had not sold any of the lots from which payments were to be generated for the Bank, and it did not take adequate steps to provide the Bank with the collateral it had promised.

The deed of trust specified the procedure for the notice that Valley Bank would provide to Petitioners if it commenced foreclosure proceedings. It called for the Bank to provide notice by mail to Petitioners at 2629 Redwing Road, Suite 370, Ft. Collins, Colorado 80526, the address shown on the first page of the Deed of Trust for Estates in Eagle Ridge. It also specified the procedure that Petitioners had to follow if they wished to change their address for receiving notice:

> **NOTICES.** Any notice required to be given under this Deed of Trust, including without limitation any notice of default and any notice of sale shall be given in writing, and shall be effective when delivered . . . or, if mailed, when deposited in the United States mail, as first class, certified or registered mail postage prepaid, directed to the addresses shown near the beginning of this Deed of Trust. All copies of notices of foreclosure from the holder of any lien which has priority over this Deed of Trust shall be sent to the Lender's address, as shown near the beginning of this Deed of Trust. Any party may change its address for notices under this Deed of Trust by giving formal written notice to the other parties, specifying that the purpose of the notice is to change the party's address. For notice purposes, Grantor agrees to keep lender informed at all times of Grantor's current address. Unless otherwise provided or required by law, if there is more than one Grantor, any notice given by

> lender to any Grantor is deemed to be notice given to all Grantors.

Although Petitioners thereafter used different letterhead addresses in communications with Valley Bank, they never requested Valley Bank to change its records to show a new address for them in the manner required by deed of trust.

The Foreclosure Process

Valley Bank commenced foreclosure proceedings on July 19, 2001. By this time, Estates in Eagle Ridge was in default by not paying interest on the $1,422,553.97 principal balance for at least four months. As required by C.R.S. § 38-38-101(1)(f), Valley Bank provided the Larimer County Public Trustee with a list of addresses to send copies of the Notice of Election and Demand for Sale, and Notice of Right to Cure and Right to Redeem. The address that Valley Bank provided to the Public Trustee for Estates in Eagle Ridge, Terry Hamilton, and Sharon Hamilton was the 2629 Redwing Road location set out in the deed of trust. The Public Trustee served these materials by first class mail on Petitioners and others. There is no evidence in the record that the copies and notices sent to Estates in Eagle Ridge, Terry Hamilton, and Sharon Hamilton at 2629 Redwing Road, Ft. Collins, Colorado, were returned for insufficient addresses, expiration of forwarding orders, or any other reason.

Colorado law requires a party that seeks foreclosure of a deed of trust to obtain an order authorizing a sale from a court of competent jurisdiction. The court's inquiry is restricted to determining the existence of a default and the absence of issues under the Soldiers' and Sailors' Civil

Relief Act. Valley Bank filed a Motion for Order Authorizing Sale under Rule 120 of the Colorado Rules of Civil Procedure and C.R.S. § 38-38-105 on September 19, 2001, and it sent a copy of the Motion to Estates in Eagle Ridge at the Redwing Road address. Six days later, the Bank filed a Notice regarding Rule 120 Hearing, a Certificate of Mailing and Posting, and a proposed Order Authorizing Sale, and it sent a copy of the Notice of the hearing to Estates in Eagle Ridge at the Redwing Road address. There is no evidence in the record that the copies and notices sent to Estates in Eagle Ridge, Terry Hamilton, and Sharon Hamilton at 2629 Redwing Road, Ft. Collins, Colorado, were returned for insufficient addresses, expiration of forwarding orders, or any other reason.

Petitioners did not respond to the Rule 120 notice, and the Denver District Court entered the Order Authorizing Sale on October 15, 2001. The record establishes, without contradiction, that Estates in Eagle Ridge was in default under the deed of trust on that date because it had failed to pay more than four months of interest on the $1,422,553.97 principal debt. The Bank sent the Order Authorizing Sale to the Public Trustee of Larimer County, and she conducted the Public Trustee Sale on October 31, 2001. This sale date meant that the six-month period of redemption for the property would expire on April 30, 2002.

The Filing and Disposition of this Lawsuit

On April 29, 2002, one day before the period of redemption for the foreclosure expired, Petitioners filed this action. Their complaint attacked the validity of the Order Authorizing Sale that the Denver District Court had

entered on October 15, 2001. Despite the fact that the remedy under Colorado law for an alleged error in the foreclosure process is an equitable extension of the time for redeeming the property, *Moreland v. Marwich, Ltd.*, 665 P.2d 613, 618-19 (Colo. 1983), the complaint sought an invalidation of the entire foreclosure process. Valley Bank filed an answer and counterclaim that explained that the Order Authorizing Sale had a clerical error in its caption that did not affect its validity. It then filed a Motion for Partial Summary Judgment that demonstrated that the Order was legally effective. Petitioners filed a Cross Motion for Summary Judgment that contended that the loan documents required the Rule 120 proceedings to be conducted in Larimer County. They also asserted that they had not obtained notice of the judicial proceedings under Rule 120. By its Order of February 19, 2003, the district court determined that the clerical error which improperly listed the Larimer County District Court on the Order Authorizing Sale was not a "substantive defect in the foreclosure process" and that Valley Bank was authorized to seek the Order from the Denver District Court. The court also determined that a material issue of fact existed regarding the knowledge which Valley Bank had regarding the address of Petitioners.

Valley Bank filed its Second Motion for Partial Summary Judgment on June 18, 2003, to address the notice that it was required to give of the foreclosure proceedings. Valley Bank demonstrated that it had provided notice to Estates in Eagle Ridge at the address established by the deed of trust, and that Estates had not provided a request for change of its address for receiving notices in the manner specified by the deed of trust. Valley Bank also offered evidence by affidavit that it had been unable to

confirm any other address for Estates in Eagle Ridge or Terry Hamilton besides the Redwing Road location. The district court entered an Order Granting Valley Bank & Trust's Second Motion for Partial Summary Judgment on August 14, 2003 (R. 254). The court determined that alternative grounds existed for dismissing the remainder of Petitioners' case, namely: (1) Valley Bank had properly complied with the notice required by the deed of trust and Colorado law by arranging for the mailing of foreclosure documents to the Redwing Road address, (2) Valley Bank had no knowledge, anyway, of any address for Petitioners other than the Redwing Road address listed in the deed of trust, and (3) Colorado law permitted notice of foreclosure proceedings to be sent to the address listed in a deed of trust despite Petitioners' assertion that Valley Bank knew of a new address.

The Court of Appeals affirmed the two summary judgment rulings. As to the second summary judgment order of August 14, 2003, that Court affirmed the first alternate ground offered by the trial court – *viz.*, that Valley Bank had given proper notice pursuant to the deed of trust and Colorado statutes. The Court of Appeals concluded that it was not necessary to reach the two alternate grounds. *Estates in Eagle Ridge, LLLP v. Valley Bank & Trust*, 141 P.3d 838, 841 (Colo. Ct. App. 2005). It determined that Petitioners had agreed with Valley Bank that all notices would be provided to the Redwing Road address unless Petitioners provided a different address in writing, and that Petitioners had not provided a notice pursuant to the deed of trust to change their address. *Id.* at 842. The Court noted that this provision was substantially similar to the notice clause contained in the deed of trust approved by the Colorado State Real Estate

Commission. (*Id.*) It held that it was proper under due process of law to hold Petitioners to the agreement they had made with Valley Bank. *Id.* at 843.

REASONS FOR DENYING THE WRIT

A. The Writ Should Be Denied Because the Decision of the Colorado Court of Appeals Does Not Conflict with Relevant Decisions of this Court.

Due process does not require that a property owner receive actual notice of a proceedings by the government to take his or her property. *Dusenbery v. United States*, 534 U.S. 161, 170 (2002). Rather, due process requires the government to provide notice that is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Notice by mail will provide notice that is consistent with due process. *Dusenbery, supra*, at 169; *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 490 (1988); *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 798 (1983); *Mullane, supra*, at 318-19.

The Colorado Court of Appeals concluded that the procedures for notice that Valley Bank and Petitioners had agreed upon in the deed of trust conformed to due process. It determined that it was reasonable to expect parties to a commercial contract to perform the obligations set out in their contract, and that, had Petitioners wanted the Bank to mail notices to them at a different address, they should have simply requested such a change in the manner spelled out in the deed of trust.

Petitioners contend that the decision of the Colorado Court of Appeals "contradicts" the later decision of this Court in *Jones v. Flowers*, 126 S. Ct. 1708 (2006). (Petition at 9, 10) They assert that a form of notice sanctioned by state statutes is constitutionally insufficient where a state official knows that the notice has not been received. They argue that Valley Bank knew that the address provided in the deed of trust was no longer valid, and that it was a violation of due process for it to fail to provide the Public Trustee with updated addresses. (Petition at 10-11)

Petitioners' arguments are deficient because they are not supported by the record. There are two serious factual flaws in their contentions.

First, there is no evidence in the record to demonstrate that the notices pertaining to the foreclosure that were mailed by the Public Trustee to Estates in Eagle Ridge, Terry Hamiilton, and Sharon Hamilton at the 2629 Redwing Road address were returned to the Public Trustee for any reason. Nor is there evidence in the record to demonstrate that the notices pertaining to the Rule 120 proceedings that were mailed by Sherman & Howard LLC to Estates in Eagle Ridge, Terry Hamiilton, and Sharon Hamilton at the 2629 Redwing Road address were returned to the law firm for any reason. The fact that a party can no longer be physically found for the service of process at a given address does not mean that the party is no longer receiving its mail. By contrast, the record in *Jones, supra*, demonstrated that the Arkansas Commissioner of State Lands attempted to provide notice by mail to Mr. Jones on two separate occasions, and that each letter was returned unopened and marked "unclaimed." This Court held that the information provided by the returned,

unclaimed envelopes required additional steps to effect notice.

Second, the record demonstrates that Petitioners were fully aware of the foreclosure proceedings. After the Larimer County District Court entered the second summary judgment against Petitioners on August 14, 2003, they filed numerous documents to support a motion for reconsideration. One of these documents was an "Intent to Cure" that Petitioner Terry Hamilton sent to the Public Trustee on September 17, 2001. This communication included the Public Trustee Sale Number that had been assigned by the Public Trustee to the foreclosure, stated an intent "to cure the default on the referenced Public Trustee foreclosure," and requested information on the total costs that had to be paid to effect a cure of the default. Mr. Hamilton's communication also provided a telephone number and an address on Hood Lane (where Valley Bank had previously attempted to serve him) for further communications. Another document that was filed by Petitioners with the court was a letter from Mr. Hamilton to Valley Bank dated September 13, 2001, that stated:

> It is my understanding that said real property will be sold at public auction by the Public Trustee on September 21, 2001, to cure the indebtedness.

(The sale date was ultimately extended to October 30, 2001.) These two documents demonstrate that Terry Hamilton, for himself and his spouse, and as registered agent for Estates in Eagle Ridge, was fully aware of the foreclosure proceedings and that he had established communications with the Public Trustee about the foreclosure sale date and a cure of the default under the note. These documents also contradict Petitioners' insinuation

that the Public Trustee knew that they had received no notice of the foreclosure proceedings, and that she violated their due process rights because she failed to investigate other forms of notice.

Petitioners have failed to demonstrate that the decision of the Colorado Court of Appeals conflicts with *Jones v. Flowers* or other relevant decisions of this Court. Their petition for a writ of certiorari should be denied for this reason.

B. The Writ Should Be Denied Because Petitioners Seek to Overturn the Factual Findings of the Larimer County District Court.

Petitioners contend that Valley Bank knew of other valid addresses at which notices of the foreclosure proceedings could be sent. (Petition at 6, 8, 10). They seek to overturn the factual finding of the Larimer County District Court that "[t]he Bank had no knowledge of the address at which Notice of foreclosure proceedings could be sent to Plaintiff Estates in Eagle Ridge LLLP, once it vacated the address listed in the Deed of Trust." The Colorado Court of Appeals found it unnecessary to review this factual determination, and it remains binding.

Petitioners' arguments about other addresses where notice should have been sent rest upon two errors. First, they rely upon documents from their files that they submitted to the trial court *after* it had already entered summary judgment against them. All of their arguments about the 541 Hood Lane address rely upon these documents. In refusing to overturn the summary judgment, the trial court presumably applied longstanding Colorado precedent that newly-submitted documents should not be

considered in a motion for reconsideration in the absence of a showing that they were "newly discovered." *Conrad v. Imatani*, 724 P.2d 89, 94 (Colo. Ct. App. 1986); *see also Little v. Fellman*, 837 P.2d 197, 203 (Colo. Ct. App. 1991). The court of appeals refused to overturn this determination.

Second, Petitioners ignore the record that the trial court relied upon in granting summary judgment. These facts show that, in June 2001, Valley Bank and Terry Hamilton were joined as defendants in a separate lawsuit in Weld County, Colorado. The plaintiff in that action contended that it had a prior security interest in the ten shares of the capital stock of the North Poudre Irrigation Company that Terry Hamilton and Sharon Hamilton had pledged to Valley Bank. Valley Bank decided to assert a counterclaim against Terry Hamilton and third-party claims against Estates in Eagle Ridge and Sharon Hamilton as part of this separate lawsuit. Because Rule 4 of the Colorado Rules of Civil Procedure required personal service of the third-party complaints, Valley Bank had to find Sharon Hamilton and Terry Hamilton, in his capacity as the registered agent for Estates in Eagle Ridge. The Bank first attempted service at 2629 Redwing Road, the address given in the deed of trust. The process server determined in August that Estates had vacated these offices a few months beforehand. Valley Bank then conducted an internet search to locate Petitioner Terry D. Hamilton, the registered agent of Estates. An address in Greeley, Colorado, turned out to be an unproductive lead. Valley Bank also attempted to serve Mr. Hamilton at 541 Hood Lane, Fort Collins, the address that Mr. Hamilton had used in the letterhead of correspondence that he had previously sent to the Bank. After numerous attempts, the process server was unsuccessful in locating him or

confirming that he lived there. In early September, Valley Bank attempted service at an address in Modesto, California, that Mr. and Mrs. Hamilton had listed in the past. The Bank's process server was able to locate only Sharon Hamilton at that address. As other attempts at serving Mr. Hamilton and Estates in Eagle Ridge had failed, Valley Bank requested this process server to leave a summons for Terry Hamilton with Sharon Hamilton. Valley Bank concluded that, if Mr. Hamilton actually resided at that address, service on his spouse would be sufficient service on him under Rule 4(e)(1) of the Colorado Rules of Civil Procedure. Its assumption was wrong. Mr. Hamilton later testified that he did not reside at that address, and, accordingly, service upon him and Estates in Eagle Ridge at that address was invalid. In fact, he later filed pleadings that gave his personal address as 1112 Oak Ridge Drive, Fort Collins, Colorado. By the time he disclosed this address, the Rule 120 proceedings had been concluded, and the foreclosure sale had been conducted.

This evidence convinced the trial court to grant summary judgment in Valley Bank's favor, and to conclude that the Bank had no knowledge of any other addresses at which notice of foreclosure proceedings should be sent. It served as the basis for the Court of Appeals' conclusion that Petitioners had never changed their address in the manner required by the deed of trust. Petitioners' position would require this Court to review and overturn the factual findings of the Larimer County District Court and Court of Appeals. The Petition should be denied for this reason also.

C. The Writ Should Be Denied Because Further Discovery Will Contradict the Representations That Petitioners Have Made to this Court.

Petitioners have represented that "[n]one of the petitioners ever received notice of the public trustee's sale or of their rights to redemption until after the property had been sold and the period of redemption had expired." (Petition at 4). As the discussion under Section A, above, shows, the fallacy of this contention is demonstrated by Mr. Hamilton's communications with the Public Trustee about the sale, his knowledge of the date set for the foreclosure sale, and his declaration of an intent to cure the default. If certiorari review of this case were to result in a remand for further proceedings, discovery would undermine Petitioners' representation further. For example, a subpoena for the records of the Public Trustee would yield the following:

- A September 17, 2001, fax of the Notice of Public Trustee's Sale for the property to Terry Hamilton from Leslie of the office of the Public Trustee. This fax informed Mr. Hamilton of the date of the foreclosure sale and was sent two days before the original sale date of September 19, 2001. The sale date was continued, ultimately, to October 30, 2001. An announcement of the new date for a postponed sale is made publicly by the Public Trustee at the time of the postponed sale. C.R.S. § 38-38-109(1). This letter demonstrates that Mr. Hamilton knew of the original sale date for the property, and had the opportunity to determine the date to which the sale was continued.

- A November 16, 2001, fax of the dollar amounts required to redeem the property to Terry Hamilton from Leslie at the office of the Public

> Trustee. The fax was sent after the sale date of October 30, 2001, and before the period of redemption expired on April 30, 2002. Redemption amounts are provided when a party declares an intent to redeem property after a foreclosure sale. C.R.S. §38-38-302(1.5). This fax demonstrates that Mr. Hamilton had declared an intent to redeem the property in November 2001.

Because of the precedural posture of this case, as well as the need for additional discovery to test Petitioners' claim of ignorance of the foreclosure and of their right to redeem, the writ should be denied.

CONCLUSION

If Petitioners wanted notice of the foreclosure proceedings to be sent somewhere else, they should have followed the procedure that they had agreed to in the deed of trust. But Petitioners knew about the foreclosure sale and that they were in communication with the Public Trustee about it and their rights to cure and to redeem. Their claims regarding a violation of their due process rights are no more than an attempt to overturn factual determinations of the Colorado courts. Their petition should be denied.

Dated this 26th day of December 2006.

Respectfully submitted,

JOSEPH J. BRONESKY
SHERMAN & HOWARD LLC
633 Seventeenth Street, Suite 3000
Denver, CO 80202
303-297-2900